

Sep 05, 2017

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MINDY MERRILL,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:16-cv-03072-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 17, 21

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 17, 21. The parties consented to proceed before a magistrate judge. ECF No. 5. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion (ECF No. 17), in part, and denies Defendant's motion (ECF No. 21).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination."

1 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
2 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
3 *Sanders*, 556 U.S. 396, 409-10 (2009).

4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within
6 the meaning of the Social Security Act. First, the claimant must be “unable to
7 engage in any substantial gainful activity by reason of any medically determinable
8 physical or mental impairment which can be expected to result in death or which
9 has lasted or can be expected to last for a continuous period of not less than twelve
10 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be
11 “of such severity that he is not only unable to do [her] previous work[,], but cannot,
12 considering [her] age, education, and work experience, engage in any other kind of
13 substantial gainful work which exists in the national economy.” 42 U.S.C. §
14 423(d)(2)(A).

15 The Commissioner has established a five-step sequential analysis to
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
17 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
18 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
19 “substantial gainful activity,” the Commissioner must find that the claimant is not
20 disabled. 20 C.F.R. § 404.1520(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
4 from "any impairment or combination of impairments which significantly limits
5 [her] physical or mental ability to do basic work activities," the analysis proceeds
6 to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment does not
7 satisfy this severity threshold, however, the Commissioner must find that the
8 claimant is not disabled. 20 C.F.R. § 404.1520(c).

9 At step three, the Commissioner compares the claimant's impairment to
10 severe impairments recognized by the Commissioner to be so severe as to preclude
11 a person from engaging in substantial gainful activity. 20 C.F.R. §
12 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
13 enumerated impairments, the Commissioner must find the claimant disabled and
14 award benefits. 20 C.F.R. § 404.1520(d).

15 If the severity of the claimant's impairment does not meet or exceed the
16 severity of the enumerated impairments, the Commissioner must pause to assess
17 the claimant's "residual functional capacity." Residual functional capacity (RFC),
18 defined generally as the claimant's ability to perform physical and mental work
19 activities on a sustained basis despite her limitations, 20 C.F.R. § 404.1545(a)(1),
20 is relevant to both the fourth and fifth steps of the analysis.

1 At step four, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing work that she has performed in the past
3 (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable of
4 performing past relevant work, the Commissioner must find that the claimant is not
5 disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing such
6 work, the analysis proceeds to step five.

7 At step five, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing other work in the national economy.
9 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
10 must also consider vocational factors such as the claimant's age, education and
11 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of
12 adjusting to other work, the Commissioner must find that the claimant is not
13 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to
14 other work, analysis concludes with a finding that the claimant is disabled and is
15 therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

16 The claimant bears the burden of proof at steps one through four above.
17 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
18 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
19 capable of performing other work; and (2) such work "exists in significant
20 numbers in the national economy." 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*,

1 700 F.3d 386, 389 (9th Cir. 2012).

2 **ALJ'S FINDINGS**

3 Plaintiff applied for Title II disability insurance benefits on December 1,
4 2014,¹ alleging a disability onset date of June 25, 2013. Tr. 202-03. The
5 application was denied initially, Tr. 128-30, and on reconsideration, Tr. 139-44.
6 Plaintiff appeared at a hearing before an Administrative Law Judge (ALJ) on
7 November 2, 2015. Tr. 38-82. On December 7, 2015, the ALJ denied Plaintiff's
8 claim. Tr. 22-32.

9 At step one, the ALJ found that Plaintiff has engaged in substantial gainful
10 activity from June 25, 2013 through September 26, 2014; however, the ALJ
11 determined that there has been a continuous twelve month period during which
12 Plaintiff has not engaged in substantial gainful activity and continued the
13 sequential evaluation. Tr. 24. At step two, the ALJ found Plaintiff has the
14 following severe impairments: posttraumatic stress disorder (PTSD), anxiety
15 disorder, depressive disorder, substance abuse in full remission, right shoulder
16 degenerative joint disease, cervical degenerative disc disease, and obesity. *Id.* At
17 step three, the ALJ found that Plaintiff does not have an impairment or
18 combination of impairments that meets or medically equals a listed impairment.

19
20 ¹ Plaintiff's protective filing date was November 25, 2014. Tr. 96, 110-11.

Tr. 25. The ALJ then concluded that Plaintiff has the RFC to perform light work, with the following limitations:

the claimant is capable of performing mental tasks at a level equivalent to that required of SVP 3 level jobs. The claimant can have incidental contact with the public and is capable of working in proximity to but not in coordination with coworkers. She can have occasional contact with supervisors. The dominant right upper extremity frequently engages in reaching, handling, fingering, and feeling. The right arm does not engage in overhead reaching. She is capable of maintaining production levels at 10% below normal and average production requirements. She would be absent from work 10 times per year. She can have occasional stooping, squatting, crouching, crawling, kneeling, and climbing stairs and ramps. She cannot climb ladders, ropes, and scaffolds.

Tr. 27. At step four, the ALJ found that Plaintiff is unable to perform relevant past work. Tr. 30. The ALJ found at step five that there are other jobs that exists in significant numbers in the national economy that Plaintiff could perform within her assessed RFC, such as an office helper and marking clerk. Tr. 31. On that basis, the ALJ concluded that Plaintiff was not disabled as defined in the Social Security Act during the adjudicative period, June 25, 2013 to December 7, 2015. Tr. 31-32.

On March 14, 2016, the Appeals Council denied review, Tr. 1-4, making the Commissioner's decision final for purposes of judicial review. *See* 42 U.S.C. 405(g); 20 C.F.R. § 422.210.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying

her disability insurance benefits under Title II of the Social Security Act. ECF No. 17. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly weighed the medical opinion evidence; and
2. Whether the ALJ properly discredited Plaintiff's symptom claims.

ECF No. 17 at 1.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff faults the ALJ for discounting the medical opinions of William Wilkinson, Ed.D., Cara Alexander, M.D., Kathryn Holgate, LMHC, and Jesus Nacanaynay. ECF No. 17 at 15-20.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant's file (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Id.* "In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of

1 nonspecialists.” *Id.* (citations omitted).

2 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
3 reject it only by offering “clear and convincing reasons that are supported by
4 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
5 “However, the ALJ need not accept the opinion of any physician, including a
6 treating physician, if that opinion is brief, conclusory and inadequately supported
7 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
8 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
9 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
10 may only reject it by providing specific and legitimate reasons that are supported
11 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
12 F.3d 821, 830-31 (9th Cir. 1995)).

13 1. *William Wilkinson, Ed.D.*

14 On April 9, 2015, Dr. Wilkinson completed a Psychological/Psychiatric
15 Evaluation form for the Washington State Department of Social and Health
16 Services. Tr. 391-99. He diagnosed Plaintiff with PTSD; depressive disorder, and
17 poly substance dependence in late sustained full remission. Tr. 393. He opined
18
19
20

1 that Plaintiff had a marked² limitation in the abilities to perform activities within a
2 schedule, maintain regular attendance, and be punctual within customary
3 tolerances without special supervision, complete a normal work day and work
4 week without interruptions from psychologically based symptoms, and maintain
5 appropriate behavior in a work setting. Tr. 393-94. Dr. Wilkinson opined that
6 Plaintiff had a moderate³ limitation in six additional basic work activities. *Id.* He
7 opined that these limitations would be present for nine to twelve months with
8 available treatment. Tr. 394. The ALJ gave some weight to Dr. Wilkinson's
9 moderate limitations but only little weight to the marked limitations because (1)
10 Plaintiff was able to maintain appropriate behavior with treatment providers and
11 others and (2) Plaintiff would have no more than 10% reduced productivity and 10
12 absences a year. Tr. 29-30.

13 Both of the reasons provided by the ALJ fail to meet the specific and
14
15
16

17 ² A marked limitation is defined as “a very significant limitation on the ability to
18 perform on or more basic work activity.” Tr. 393.

19 ³ A moderate limitation is defined as “there are significant limits on the ability to
20 perform one or more basic work activity.” Tr. 393.

1 legitimate standard.⁴ The specific and legitimate standard can be met by the ALJ
2 setting out a detailed and thorough summary of the facts and conflicting clinical
3 evidence, stating his interpretation thereof, and making findings. *Magallanes v.*
4 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than
5 offer his conclusions, he “must set forth his interpretations and explain why they,
6 rather than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422
7 (9th Cir. 1988). In this case, both reasons the ALJ provided were conclusory and
8 lacked a single citation to the record to support the determination. The ALJ
9 provided no citation to the record or reference to any evidence that supported his
10 assertion that Plaintiff was able to maintain appropriate behavior with treatment
11 providers and others. Tr. 29-30. Additionally, the ALJ’s determination that
12 Plaintiff would have no more than 10% reduced productivity and 10 absences a
13 year is a finding addressed in the RFC assessment and not the opinion of another
14 provider. Tr. 27. The practice of rejecting a provider’s opinion because it is

16 ⁴ Neither party asserts whether Dr. Wilkinson’s opinion is contradicted, thus failing
17 to allege which of the two standards apply to the opinion. ECF Nos. 17, 21.

18 However, seeing that neither reason meets the lessor standard of specific and
19 legitimate, it is not necessary for this Court to make a finding as to which standard
20 applies.

1 inconsistent with the RFC determination is illogical as the RFC determination is
2 supposed to be based on an evaluation of the evidence, including medical source
3 opinions. *See* 20 C.F.R. §§ 404.1520(e); 404.1545(a)(3) (The RFC is based on all
4 the relevant medical and other evidence in the case record.). Therefore, these
5 reasons are insufficient under *Embrey*.

6 Defendant asserts that the ALJ provided a third reason, that Dr. Wilkinson's
7 reports were inconsistent. ECF No. 21 at 10 (*citing* Tr. 28). However, the
8 paragraph of the ALJ's decision Defendant cites is actually a portion of the ALJ's
9 credibility determination and specifically a finding that Plaintiff's medical records
10 failed to support her reported symptoms. Tr. 28. In addressing Dr. Wilkinson's
11 opinion, the ALJ does not address any inconsistency in the medical records,
12 internally or otherwise. Tr. 29-30. As such, Defendant's assertion is a *post hoc*
13 rationalization, which will not be considered by this Court. *See Orn v. Astrue*, 495
14 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only the reasons provided
15 by the ALJ in the disability determination and may not affirm the ALJ on a ground
16 upon which he did not rely.").

17 Considering the ALJ provided conclusory reasons for rejecting Dr.
18 Wilkinson's marked limitations that fail to meet the specific and legitimate
19 standard, the case is remanded for additional proceedings to allow the ALJ to
20 properly address the opinion.

1 2. *Cara Alexander, M.D.*

2 On March 12, 2015, Dr. Alexander completed a Psychiatrist Evaluation of
3 Plaintiff. Tr. 376-80. Dr. Alexander diagnosed Plaintiff with PTSD, major
4 depressive disorder, and borderline traits. Tr. 379. Dr. Alexander stated the
5 following:

6 These diagnoses are currently severe and are significantly interfering
7 with her ability to work. Specifically in the areas of organization,
8 concentration, motivation, self-care, and interpersonal skills, she
9 shows impairment. She reported this in the history. I also saw this on
10 exam by her intense and guarded interpersonal style (which later
11 calmed significantly when we developed an alliance). On her
12 cognitive exam, she showed poor concentration in spelling WORLD
13 backward. Serial 7s were also slightly incorrect. I think this shows
14 poor concentration since the first 3 answers were correct. She also
15 showed concrete thinking in her interpretation of the proverb. This
16 kind of thinking can make it difficult to interpret people's intentions
17 in interpersonal situations and can lead to worse anxiety. She also
18 reported that she has not been grooming herself or feeding herself
19 well because of her depression. So I imagine that it would be very
20 difficult for her to maintain a job at this time due to the severity of her
symptoms.

Tr. 379. Additionally, Dr. Alexander provided the following medical source
statement:

Despite her impairments, the claimant does show good understanding
in her ability to follow conversation and 3-step command. She shows
good social interaction once she feels safe. She shows good
adaptation in the sense that she overcame a serious drug problem and
even got a degree in counseling. She showed good memory in her
recall of 3 objects. She showed good ability to reason in her judgment
test.

Tr. 379. The ALJ gave little weight to this opinion because (1) it was merely
ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT - 13

1 conclusory and without a function by function explanation and (2) it was
2 inconsistent with the examination. Tr. 30.

3 The ALJ's reasons for rejecting Dr. Alexander's opinion are not supported
4 by substantial evidence. First, while Dr. Alexander did not complete a RFC
5 assessment form, she did address several of Plaintiff's abilities on a function by
6 function basis throughout her opinion, specifically addressing her concentration,
7 motivation, self-care, and interpersonal skills. *See* Tr. 379.

8 Second, the ALJ found that Dr. Alexander's opinion was inconsistent with
9 her examination, specifically as to Plaintiff's memory and concentration. Tr. 30.
10 The ALJ found that the "opinion is not fully consistent with the examination that
11 showed the claimant with intact recent and remote memory." Tr. 30. However,
12 Dr. Alexander did not opine that Plaintiff's memory was impaired. Dr. Alexander
13 specifically found that Plaintiff showed "good memory in her recall of 3 objects."
14 Tr. 379. Therefore, there was no inconsistency regarding Plaintiff's memory.

15 Additionally, the ALJ found that Dr. Alexander's opinion regarding
16 Plaintiff's concentration was inconsistent with the examination results, stating that
17 upon examination Plaintiff "exhibited good attention and concertation and was
18 able to follow a three-step command. The claimant had no difficulty following the
19 conversation." Tr. 30. The ALJ's determination appears to be based on a premise
20 that Dr. Alexander's opinion overstated Plaintiff's limitations and the medical

1 evaluation showed a lesser degree of severity. However, the evaluation reports
2 stated that Plaintiff “showed poor concentration in spelling WORLD backward.
3 Serial 7s were also slightly incorrect. I think this shows poor concentration since
4 the first 3 answers were correct.” *Id.* Dr. Alexander then opined that Plaintiff
5 “does show good understanding in her ability to follow conversation and 3-step
6 command[s].” *Id.* Therefore, the ALJ’s determination is actually the opposite of
7 what the administrative record shows and is not supported by substantial evidence.

8 Considering the ALJ failed to provide reasons supported by substantial
9 evidence to support his rejection of Dr. Alexander’s opinion, this case is to be
10 remanded for additional proceedings to address the opinion. *See Hill*, 698 F.3d at
11 1158.

12 3. *Jesus Nacanaynay, MA, MHP, and Kathryn Holgate, LMHC*

13 On April 28, 2015, Mr. Nacanaynay completed a Mental Impairment
14 Questionnaire, Tr. 466-70, and on October 19, 2015, Ms. Holgate completed a
15 similar form. Tr. 573-78. The ALJ rejected the opinions contained on these forms
16 because (1) they were based on a few recent sessions with Plaintiff and (2) they
17 failed to include a narrative section, which is the functional opinion under POMS
18 DI 24510.060. Tr. 29.

19 Mr. Nacanaynay and Ms. Holgate are not an acceptable medical sources.
20

1 *See* 20 C.F.R. § 404.1502⁵ (Acceptable medical sources are licensed physicians,
2 licensed or certified psychologists, licensed optometrists, licensed podiatrists, and
3 qualified speech-language pathologists.). An ALJ is required to consider evidence
4 from non-acceptable medical sources and non-medical sources. 20 C.F.R. §
5 404.1527(f).⁶ An ALJ must give reasons “germane” to each source in order to
6 discount evidence from non-acceptable medical sources. *Ghanim v. Colvin*, 763
7 F.3d 1154, 1161 (9th Cir. 2014).

8 The ALJ’s first reason is sufficient to meet the germane standard. By Mr.
9 Nacanaynay’s April 28, 2015 opinion, he had seen Plaintiff eleven times with the
10 first being on November 20, 2014. Tr. 367-74, 413-23, 433. By Ms. Holgate’s
11 October 19, 2015 opinion, she had completed Plaintiff’s treatment plan dated
12 October 14, 2015. Tr. 553-56. Since the treatment was recent and limited to a
13 short period of time, the reason meets the germane standard. *See* 20 C.F.R.
14 404.1527(f)(1) (the length of the treatment relationship and the frequency of
15 examination are factors to consider when weighing the opinion of a non-acceptable

17 ⁵ Prior to March 27, 2017, the definition of an acceptable medical source was
18 located at 20 C.F.R. § 404.1513.

19 ⁶ Prior to March 27, 2017, the requirement that an ALJ consider evidence from
20 non-acceptable medical sources was located at 20 C.F.R. § 404.1513(d).

1 medical source).⁷

2 The ALJ's second reason does not meet the germane standard. POMS DI
3 24510.060 sets forth the agency's operating policy on the completion of Form
4 SSA-4734-F4-SUP. However, a comparison of Form SSA-4734-F4-SUP and the
5 forms completed by Mr. Nacanaynay and Ms. Holgate show drastic differences.
6 First, Form SSA-4734-F4-SUP is much shorter, containing only three sections: (1)
7 Summary Conclusions containing twenty functional abilities and boxes to rate the
8 level of impairment ranging from no evidence of limitation to markedly limited
9 (commonly known as a mental RFC); (2) Remarks; and (3) Functional Capacity
10 Assessment.⁸ The forms completed by Mr. Nacanaynay and Ms. Holgate contain
11 seventeen questions, only one of which addresses the functional limitations
12 commonly known as a mental RFC. Tr. 466-70, 573-78. Several of these
13 questions pertain to meeting one of the 12.00 listings, including a symptoms list
14 and the "B Criteria". Tr. 467, 469, 574. Additionally, when addressing the
15 functional abilities that are commonly known as the mental RFC, the forms

17 ⁷ Prior to March 27, 2017, this factor was applied to non-acceptable medical sources
18 by S.S.R. 06-03p.

19 ⁸ Copy of form located at THOMAS E. BUSH, SOCIAL SECURITY DISABILITY
20 PRACTICE § 245.4 (James Publishing, Inc. 2nd ed., 24th rev., 2017).

1 completed by Mr. Nacanaynay and Ms. Holgate have definitions for the degrees of
2 limitation, Tr. 467, 574, while Form SSA-4734-F4-SUP does not. Therefore, the
3 determination that these contrasting forms are sufficiently alike for POMS DI
4 24510.060 to apply is not supported by substantial evidence. Additionally, the
5 forms completed by Mr. Nacanaynay and Ms. Holgate have much more
6 opportunity for narrative discussion than does Form SSA-4734-F4-SUP.

7 Even though the ALJ provided a germane reason for discounting these
8 opinions, the case is being remanded for the ALJ to address other opinions in the
9 record. Therefore, the ALJ is further instructed to readdress the opinions of Mr.
10 Nacanaynay and Ms. Holgate upon remand.

11 **B. Adverse Credibility Finding**

12 Plaintiff faults the ALJ for failing to provide specific findings with clear and
13 convincing reasons for discrediting her symptom claims. ECF No. 17 at 7-15.

14 An ALJ engages in a two-step analysis to determine whether a claimant's
15 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must
16 determine whether there is objective medical evidence of an underlying
17 impairment which could reasonably be expected to produce the pain or other
18 symptom alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
19 "The claimant is not required to show that her impairment could reasonably be
20 expected to cause the severity of the symptom she has alleged; she need only show

1 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*
2 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if she gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim*, 763 F.3d at 1163 (internal citations and quotations omitted).
7 “General findings are insufficient; rather, the ALJ must identify what testimony is
8 not credible and what evidence undermines the claimant’s complaints.” *Id.*
9 (quoting *Lester*, 81 F.3d at 834); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.
10 2002) (“[T]he ALJ must make a credibility determination with findings sufficiently
11 specific to permit the court to conclude that the ALJ did not arbitrarily discredit
12 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most
13 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
14 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
15 924 (9th Cir. 2002)).

16 In making an adverse credibility determination, the ALJ may consider, *inter*
17 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
18 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s
19 daily living activities; (4) the claimant’s work record; and (5) testimony from
20 physicians or third parties concerning the nature, severity, and effect of the

1 claimant's condition. *Thomas*, 278 F.3d at 958-59.

2 The ALJ found that while Plaintiff's medically determinable impairments
3 could reasonably be expected to cause some of the alleged symptoms, he found
4 Plaintiff less than fully credible concerning the intensity, persistent and limiting
5 effects of the reported symptoms. Tr. 27. The ALJ found Plaintiff's symptom
6 reports less than fully credible because (1) the limited treatment for her physical
7 impairments are inconsistent with her reported symptoms, (2) the medical evidence
8 does not support the severity of reported symptoms, (3) her cancellation of mental
9 health appoints is inconsistent with her alleged symptoms, and (4) she held herself
10 out as available for work through the receipt of unemployment benefits. Tr. 28-29.

11 Considering the case is being remanded for the ALJ to further address
12 medical source opinions, *see supra.*, and the evaluation of a claimant's statements
13 regarding limitations relies in part on the assessment of the medical evidence, *see*
14 20 C.F.R. § 404.1529(c), the ALJ is further instructed to make a new assessment as
15 to whether Plaintiff's subjective symptom statements are consistent with the record
16 as a whole. *See* S.S.R. 16-3p.

17 **C. Remand**

18 Plaintiff urges the Court to remand for immediate award of benefits. ECF
19 No. 22 at 1. To do so, the Court must find that the record has been fully developed
20 and further administrative proceedings would not be useful. *Garrison*, 759 F.3d at

1 1019-20; *Varney v. Sec. of Health and Human Servs.*, 859 F.2d 1396, 1399 (9th
2 Cir. 1988). But where there are outstanding issues that must be resolved before a
3 determination can be made, and it is not clear from the record that the ALJ would
4 be required to find a claimant disabled if all the evidence were properly evaluated,
5 remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir.
6 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

7 Here, it is not clear from the record that the ALJ would be required to find
8 Plaintiff disabled if all the evidence were properly evaluated. Further proceedings
9 are necessary for the ALJ to properly weigh medical opinions in the record and
10 address the credibility of Plaintiff's symptom reports. The ALJ is instructed to
11 supplement the record with any outstanding evidence and take testimony from a
12 medical and a vocational expert at a remand hearing.

13 CONCLUSION

14 IT IS ORDERED:

- 15 1. Plaintiff's motion for summary judgment (ECF No. 17) is **GRANTED**,
16 **in part**, and the matter is **REMANDED** to the Commissioner for
17 additional proceedings consistent with this order.
- 18 2. Defendant's motion for summary judgment (ECF No. 21) is **DENIED**.
- 19 3. Application for attorney fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order, enter

1 **JUDGMENT FOR THE PLAINTIFF**, provide copies to counsel, and **CLOSE**
2 **THE FILE.**

3 DATED September 5, 2017.

4 *s/Mary K. Dimke*

5 MARY K. DIMKE

6 UNITED STATES MAGISTRATE JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20